

CLEARY GOTTlieb STEEN & HAMILTON LLP

ONE LIBERTY PLAZA  
NEW YORK, NY 10006-1470  
(212) 225-2000  
FACSIMILE (212) 225-3999  
WWW.CLEARYGOTTlieb.COM

WASHINGTON, DC • PARIS • BRUSSELS  
LONDON • MOSCOW • FRANKFURT • COLOGNE  
ROME • MILAN • HONG KONG • BEIJING

MARK A. WALKER  
LESLIE B. SAMUELS  
EDWARD F. GREENE  
ALLAN G. SPERLING  
EVAN A. DAVIS  
LAURENT ALPERT  
VICTOR I. LEWKOW  
LESLIE N. SILVERMAN  
ROBERT L. TORTORELLO  
A. RICHARD SUSKO  
LEE C. BUCHHEIT  
JAMES M. PEASLEE  
ALAN L. BELLER  
THOMAS J. MOLONEY  
WILLIAM F. GORIN  
MICHAEL L. RYAN  
ROBERT P. DAVIS  
YARON Z. REICH  
RICHARD S. LINDER  
JAIME A. EL KOURY  
STEVEN G. HOROWITZ  
ANDREA G. PODOLSKY  
JAMES A. DUNCAN  
STEVEN M. LOEB  
DANIEL S. STERNBERG  
DONALD A. STERN  
CRAIG B. BROD  
SHELDON H. ALSTER  
WANDA J. OLSON  
MITCHELL A. LOWENTHAL  
DEBORAH M. BUELL  
EDWARD J. ROSEN  
LAWRENCE B. FRIEDMAN  
NICOLAS GRABAR  
CHRISTOPHER E. AUSTIN  
SETH GROSSHANDLER  
WILLIAM A. GROLL  
JANET L. FISHER

DAVID L. SUGERMAN  
HOWARD S. ZELBO  
DAVID E. BRODSKY  
ARTHUR H. KOHN  
RAYMOND B. CHECK  
RICHARD J. COOPER  
JEFFREY S. LEWIS  
PAUL J. SHIM  
STEVEN L. WILNER  
ERIKA W. NIJENHUIS  
LINDSEY P. GRANFIELD  
ANDRES DE LA CRUZ  
DAVID C. LOPEZ  
GARMEN A. CORRALES  
JAMES L. BROWLEY  
PAUL E. GLOTZER  
MICHAEL A. GERSTENZANG  
LEWIS J. LIMAN  
LEV L. DASSIN  
NEIL Q. WHORISKEY  
JORGE U. JUANTORENA  
MICHAEL D. WEINBERGER  
DAVID LEINWAND  
JEFFREY A. ROSENTHAL  
ETHAN A. KLINGSBERG  
MICHAEL J. VOLKOVITSCH  
MICHAEL D. DAYAN  
CARMINE D. BOCCUZZI JR.  
JEFFREY D. KAPFF  
KIMBERLY BROWN BLACKLOW  
ROBERT J. RAYMOND  
LEONARD C. JACOBY  
SANDRA L. FLOW  
FRANCESCA L. ODELL  
WILLIAM L. MCRAE  
JASON FACTOR  
MARGARET S. PEONIS  
LISA M. SCHWEITZER

KRISTOFER W. HESS  
JUAN G. GIRÁLDEZ  
DUANE MCLAUGHLIN  
BREON S. PEACE  
MEREDITH E. KOTLER  
CHANTALE E. KORDULA  
BENET J. O'REILLY  
DAVID AMAN  
ADAM E. FLEISHER  
SEAN A. ONEAL  
GLENN P. MCGRORY  
CHRISTOPHER P. MOORE  
JOON H. KIM  
MATTHEW P. SALERNO  
MICHAEL J. ALBANO  
VICTOR L. HOU  
RESIDENT PARTNERS  
  
SANDRA M. ROCKS  
ELLEN M. CREEDE  
S. DOUGLAS BORISKY  
JUDITH KASSEL  
DAVID E. WEBB  
PENELOPE L. CHRISTOPHORE  
BOAZ S. MORAG  
MARY E. ALCOCK  
GABRIEL J. MESA  
DAVID H. HERRINGTON  
HEIDE H. ILGENFRTZ  
KATHLEEN M. EMBERGER  
NANCY I. RUSKIN  
WALLACE L. LARSON JR.  
JAMES D. SMALL  
AVRAM E. LUFT  
ELIZABETH LENAS  
DANIEL ILAN  
RESIDENT COUNSEL

August 26, 2010

VIA FEDERAL EXPRESS

The Honorable Robert D. Drain  
United States Bankruptcy Judge  
United States Bankruptcy Court for the Southern District of New York  
300 Quarropas Street  
White Plains, NY 10601-4140

Re: In re DPH Holdings Corp. et al., Case No. 05-44481 (RDD)

Dear Judge Drain:

We represent the Hewlett Packard Defendants<sup>1</sup> in the above-captioned cases and related adversary proceedings. We write at the request and on behalf of various defendants concerning the form of order memorializing Your Honor's rulings on the First Wave Motions (as defined in this Court's Order Establishing Certain Procedures with Respect to Pending Motions to Dismiss Adversary Proceedings, dated April 23, 2010 (D.I. 19947), the "Procedures Order"). Specifically, in accordance with Your Honor's direction, following the July 22, 2010 hearing on the First Wave Motions, plaintiffs have consulted with our firm and certain other defense counsel in an effort to agree upon a form of order that could be submitted on consent.

The parties have reached agreement in large part on the content of the proposed order; however, there are two discrete points on which the parties have been unable to reach agreement. In order to resolve these disputes, the parties agreed to submit their proposed forms of order, along with a short letter setting forth their respective positions. Defendants' proposed form of order is attached hereto as Exhibit A, plaintiffs' is attached as Exhibit B.<sup>2</sup> For the Court's

<sup>1</sup> The Hewlett Packard Defendants include each of: (i) HP Enterprise Services, LLC (f/k/a Electronic Data Systems Corporation), HP Enterprise Services UK Ltd. (f/k/a Electronic Data Systems Ltd.) and Hewlett-Packard (Canada) Co. (f/k/a EDS Canada, Inc.), each named as defendants in Adversary Proceeding No. 07-2262; and (ii) Hewlett-Packard Company, Hewlett-Packard Financial Services Company and Hewlett-Packard Mexico, S. de R.L. de C.V., each named as defendants in Adversary Proceeding No. 07-2449.

<sup>2</sup> We also enclose a diskette containing a Microsoft Word version of defendants' proposed order.

Hon. Robert D. Drain, p. 2  
August 26, 2010

convenience, a blackline showing differences between the two orders and a copy of the transcript of the July 22, 2010 hearing are attached as Exhibits C and D, respectively.

The two provisions that remain at issue are as follows<sup>3</sup>:

1. Consequences of Failure to Satisfy Rule 8. The parties agree that the Court ruled that the complaints fail to allege sufficient information to satisfy Rule 8. Accordingly, the order should reflect that holding, and provide that the complaints are dismissed without prejudice, and that plaintiffs are permitted to move to amend, as stated by the Court on the record. See Hr'g Tr. 277:16-17 July 22, 2010 ("I concluded that the complaints need to be dismissed."), Hr'g Tr. 277:25-278:3 ("my ruling today is that the complaint would be dismissed, i.e., that portion of the motion seeking relief to dismiss the complaint was granted"). This comports with Federal Rule of Civil Procedure 12(b)(6), as well as the cases cited by the Court.<sup>4</sup> Consistent with the similar orders entered in In re Hydrogen and Levitt & Sons, paragraph 4 of defendants' proposed order provides that the relevant complaints fail to plead sufficient facts to satisfy Rule 8, and have been dismissed without prejudice.

By contrast, paragraph 4 of Plaintiffs' proposed order fails to acknowledge either the Court's holding that the complaints do not comply with Rule 8, or that as a result the complaints are dismissed without prejudice pending a ruling on the motions to amend. Instead, Plaintiffs' proposed order provides only that if Plaintiffs fail to timely file a motion for leave to amend, the complaints will be dismissed. This formulation not only renders dismissal of the complaints dependent on the further passage of time and the non-occurrence of motion practice, but leaves unclear whether a subsequent order would be required even then for the complaints to be dismissed. Defendants respectfully request that the Court adopt their formulation of paragraph 4 in its order.

2. Abandonment of Preference Claims Under \$250,000. Certain defendants have raised concerns regarding Plaintiffs' formulation of paragraph 2 of the order, which

---

<sup>3</sup> While aside from the points set forth herein, there appear to be no substantive differences between the parties' proposed orders, plaintiffs' proposal attaches exhibits listing various adversary proceedings, while defendants' order incorporates by reference the definitions from a prior order that did so.

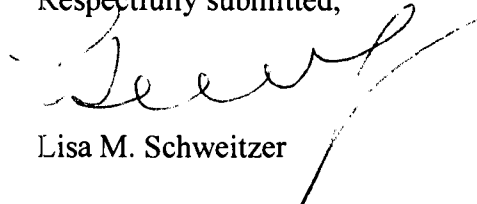
<sup>4</sup> See, e.g., Official Comm. of Unsecured Creditors of Hydrogen, L.L.C. v. Leo Blomen et al. (In re Hydrogen LLC), No. 09-1142 (AJG), 2010 Bankr. LEXIS 1106, at \*\*38-39 (Bankr. S.D.N.Y. Apr. 20, 2010) (holding that because "the pleadings relating to the preference claims brought against Mr. Freeh [were] deficient under . . . Federal Rule of Civil Procedure 8", "[t]he preference [] claims therefore *cannot survive Mr. Freeh's motion to dismiss*") (emphasis added); In re Hydrogen LLC, No. 09-1142 (AJG), Order Dismissing Claims Pursuant to Opinion Concerning Defendants' Motions to Dismiss (D.I. 58, Bankr. S.D.N.Y. Apr. 30, 2010) ("the Freeh Motion is granted as follows: the Third, Forth, Fifth, Seventh and Tenth Claims for Relief in the Amended Complaint *are hereby dismissed* in their entirety.") (emphasis added); Feltman v. Keybank, N.A. (In re Levitt & Sons LLC), No. 07-19845-BKC, 2010 Bankr. LEXIS 1284, at \*6 (Bankr. S.D. Fla. Apr. 16, 2010) (because plaintiffs failed to satisfy Rule 8, "order[ing] as follows . . . The motion to dismiss is granted, [and] the *complaint is dismissed* without prejudice."); see also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) ("*To survive a motion to dismiss*, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.") (emphasis added) (citation omitted).

Hon. Robert D. Drain, p. 2  
August 26, 2010

dismisses claims of less than \$250,000. Under plaintiffs' formulation, the debtors have not abandoned claims where all transfers made to a defendant in the aggregate exceeded \$250,000, rather than merely transfers made on account of antecedent debts that are susceptible to avoidance under Section 547. In its ruling, the Court held that preference claims under \$250,000 were abandoned when the Court granted the debtors' Preservation of Estate Claims Procedures Motion.<sup>5</sup> While it is black letter law that a prima facie preference claim must be for or on account of an antecedent debt (11 U.S.C. § 547(b)(2)), plaintiffs omit this element in the provision of the order describing the preference claims that were abandoned, referring instead only to transfers made during the 90 days preceding the petition date. As defendants' proposed order makes clear, the thresholds for potential preference claims that were abandoned should also reflect the necessary element that the transfer(s) be for or on account of antecedent debt.<sup>6</sup> It makes little sense that the Debtors would have intended to abandon a seemingly valid prima facie preference claim involving transfers on account of antecedent debt aggregating \$249,000 but would have intended to pursue a claim where, even though aggregate transfers might be higher than \$250,000, the aggregate preferential transfers on account of antecedent debt are below \$250,000. Defendants therefore respectfully request that the Court adopt defendants' formulation, which requires that the \$250,000 threshold be satisfied with reference to transfers for or on account of antecedent debt.

We are available at the Court's convenience, if the Court desires to discuss these proposed orders with counsel.

Respectfully submitted,



Lisa M. Schweitzer

cc (by email, w/out enclosures):

Eric Fisher, Esq.  
Donald Orlandoni, Esq.  
Neil Berger, Esq.  
Defense Counsel

---

<sup>5</sup> See Expedited Motion For Order Under 11 U.S.C. §§102(1)(A), 105(a), 107, 108(a)(2) and 546(a) and Fed. R. Bankr. P. 7004, 9006(c), and 9018 (i) Authorizing Debtors to Enter Into Stipulations Tolling Statute of Limitations with Respect to Certain Claims, (ii) Authorizing procedures to Identify Causes of Action that Should be Preserved, and (iii) Establishing Procedures for Certain Adversary Proceedings Including Those commenced by Debtors Under 11 U.S.C. §541, 544, 545, 547, 548, or 553 dated August 6, 2007 (D.I. 8905, the "Preservation of Estate Claims Procedures Motion")

<sup>6</sup> Indeed, this Court recognized the importance of the antecedent debt element in ruling that Debtors' amended complaints must plead the antecedent debt with particularity. See Hr'g Tr. 205:2-9 ("under Iqbal and Twombly and the cases, including Judge Gonzalez' case on preferences, there's certain key elements of the claim that require more than just a recitation of the elements of the claim. And that's . . . what was the antecedent debt?").